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Md Jahangir v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42JSKS-02–02 OF 2019
MOHD NAZLAN J
17 JANUARY 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 14(a) of Sexual Offences Against Children Act 2017 — Appellant pleaded guilty — Appellant convicted and sentenced to six years imprisonment and two strokes of whipping — Whether appeal against conviction ought to be allowed — Whether sentence imposed manifestly inadequate or grossly excessive or wrong in law — Sexual Offences Against Children Act 2017 s 14(a)

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This was an appeal filed by the appellant against the conviction and sentence imposed by the sessions court in Putrajaya following his guilty plea. The appellant had been charged with an offence of sexual physical assault on a boy under s 14(a) of the Sexual Offences Against Children Act 2017. Having heard the plea of mitigation from the appellant and the submission of the prosecution, the sessions court sentenced him to six years imprisonment from the date of his arrest and two strokes of whipping. In imposing the sentence against the appellant, the sessions court took into consideration factors such as the public interest and thus, the need to uphold and promote the deterrence principle within the society; the seriousness of the offence; the psychological and emotional impact left on the victim following the incident; and the rampancy of sexual offences against children. Hence this appeal by the appellant.

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Held, dismissing the appeal:

(1) Although the written submissions contained some references to the arguments that the appellant might not had understood the charge before pleading guilty, there was no application or submission for the court to exercise its revisionary powers. Furthermore, the appellant only submitted on the appeal against the sentence and did not pursue the appeal against conviction. For these reasons, the decision of the sessions court on the conviction of the appellant stood (see paras 22–24).

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(2) The sentence of six years' imprisonment and two strokes of whipping was within the range of punishment for cases under s 14 of the Sexual Offences Against Children Act 2017. The learned sessions court judge had taken into consideration all relevant factors when meting out the sentence. The seriousness of the crime committed by the appellant was

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taken into account, including the rampancy of such offences. And these had been weighed against mitigating factors raised by the appellant. The learned sessions court judge was especially mindful of considerations of public interest with emphasis on the sentencing principle of deterrence. The learned sessions court judge had evaluated all relevant considerations in seeking to achieve a sentence that as closely as possible reflect the key sentencing objectives of retribution and reformation but also especially prevention and deterrence. The sentence meted out against the appellant — of six years' imprisonment from the date of arrest and two strokes of whipping was in consonance with a careful attempt to strike a balanced determination of the most proportionate, fair and appropriate punishment for the appellant for having pleaded guilty to the commission of the offence under s 14(a) of the Sexual Offences Against Children Act 2017 (see paras 56–59).

[Bahasa Malaysia summary

Ini adalah rayuan yang difailkan oleh perayu terhadap sabitan dan hukuman yang dijatuhkan oleh mahkamah sesyen di Putrajaya berikutan pengakuan bersalahnya. Perayu telah didakwa dengan kesalahan melakukan serangan fizikal seksual terhadap seorang budak lelaki di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017. Setelah mendengar pengakuan mitigasi dari perayu dan hujahan pihak pendakwaan, mahkamah sesyen menjatuhkan hukuman penjara enam tahun dari tarikh penangkapannya dan dua kali sebatan. Dalam menjatuhkan hukuman terhadap perayu, mahkamah sesyen mempertimbangkan faktor-faktor seperti kepentingan umum dan dengan itu, perlunya menegakkan dan mempromosikan prinsip pencegahan dalam masyarakat; keseriusan kesalahan; kesan psikologi dan emosi yang ditinggalkan kepada mangsa berikutan kejadian itu; dan berleluasanya kesalahan seksual terhadap kanak-kanak. Oleh itu rayuan ini oleh perayu.

Diputuskan, menolak rayuan:

(1) Walaupun hujahan bertulis mengandungi beberapa rujukan pada hujah-hujah bahawa perayu mungkin tidak memahami tuduhan tersebut sebelum mengaku bersalah, tidak ada permohonan atau hujahan untuk mahkamah menggunakan kuasa semakannya. Selanjutnya, perayu hanya mengemukakan rayuan terhadap hukuman dan tidak meneruskan rayuan terhadap sabitan. Atas sebab-sebab ini, keputusan mahkamah sesyen atas sabitan perayu adalah tetap (lihat perenggan 22–24).

(2) Hukuman penjara enam tahun dan dua sebatan adalah dalam jangkaan hukuman bagi kes di bawah s 14 Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017. Hakim mahkamah sesyen yang bijaksana telah mempertimbangkan semua faktor yang relevan ketika menjatuhkan hukuman. Keseriusan kesalahan yang dilakukan oleh

perayu telah diambil kira, termasuk peningkatan kesalahan tersebut. Dan ini telah dipertimbangkan terhadap faktor-faktor mitigasi yang ditimbulkan oleh perayu. Hakim mahkamah sesyen yang bijaksana sedar akan pertimbangan kepentingan umum dengan penekanan pada prinsip hukuman pencegahan. Hakim mahkamah sesyen yang bijaksana telah menilai semua pertimbangan yang relevan dalam usaha mencapai hukuman yang sedekat mungkin mencerminkan objektif hukuman utama pemulihan dan penambahbaikan tetapi juga terutamanya pencegahan. Hukuman yang dijatuhkan terhadap perayu — penjara enam tahun dari tarikh penangkapan dan dua kali sebatan sesuai dengan usaha untuk membuat keputusan yang seimbang mengenai hukuman yang paling setanding, adil dan sesuai bagi perayu kerana telah mengaku bersalah atas kesalahan yang dilakukan di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (lihat perenggan 56–59).]

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Gabriel v PP [1992] 1 MLJ 593, HC (refd)
Gek Sing a/l Kaliappan v PP [1999] 6 MLJ 641, HC (refd)
Helerry ak Bungkok v PP [2019] 10 MLJ 308, HC (refd)
Ho Kin Luan & Anor v PP [1959] 1 MLJ 159, HC (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37 (refd)
Melvani v PP [1971] 1 MLJ 137 (refd)
Mohamad Izzaini bin Zainudin v PP [2019] 7 MLJ 366, HC (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645, CA (refd)
Pendakwa Raya v Abdul Halim bin Ishak & Anor [2013] MLJU 821; [2013] 9 CLJ 559, HC (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (folld)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70, HC (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
R v Ball (1951) 35 Cr App Rep 164 (refd)
R v Ipeelee [2012] SCJ No 13, SC (folld)
Razali bin Silah v PP [2019] 12 MLJ 205, HC (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)

Legislation referred to

Criminal Procedure Code ss 305, 316
Penal Code ss 354, 377D, 377E
Sexual Offences Against Children Act 2017 s 14, 14(a), (d)

Surjan Singh Sidhu (Surjan Singh Sidhu & Co) for the appellant.

Nur Asyikin bt Mokhtar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is an appeal filed by the appellant, who had been charged with an offence of sexual physical assault on a boy, against the conviction and sentence imposed by the Sessions Court in Putrajaya following his guilty plea on 8 February 2019.

[2] At the conclusion of the hearing, I dismissed the appeal and highlighted my main reasons for the same. This judgment sets out the full reasons for the decision.

KEY BACKGROUND FACTS

[3] The appellant was on 13 December 2018 charged at the Sessions Court Putrajaya for an offence under s 14(a) of the Sexual Offences Against Children Act 2017. The charge reads as follows:

> Bahawa kamu pada 22.11.2018 jam lebih kurang 8.30 malam, di bilik stor Medan Selera Jaya 223, Jalan 51A/223, Seksyen 51A, 46100 Petaling Jaya, di dalam Negeri Selangor telah didapati melakukan amang seksual fizikal ke atas (1) kanak-kanak lelaki bernama XXXXXX XXXXXX, No KP: (KP: XXXXXX-XX-XXXX) yang berumur 11 tahun dengan cara meraba badan serta menyentuh kemaluannya bagi tujuan seksual. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

[4] The name and identification number of the victim have been removed in order to protect his identity as he was a child at the time of the offence. For completion the relevant parts of the relevant statute states the following:

> 14 Physical sexual assault on a child
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> Any person who, for sexual purposes —
>
> (a) touches any part of the body of a child;
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> (b) makes a child touch any part of the body of such person or of any other person;
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> (c) makes a child touch any part of the child's own body; or
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> (d) does any other acts that involve physical contact with a child without sexual intercourse,
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> commits an offence and shall, on conviction, be punished with imprisonment for a

term not exceeding twenty years and shall also be liable to whipping.

Explanation 1 — The act of touching may involve the act of touching with any part of the body or with an object and may be done through anything including anything worn by the person touching or by the child touched.

Explanation 2 — In determining what constitutes sexual purposes, the court may take into consideration, among others, the part of the body that is touched, the nature and extent of the act of touching or the physical contact and all other circumstances surrounding the conduct.

[5] On the subsequent date of 8 January 2019, the charge was read to the appellant, with the assistance of a Bangladeshi interpreter, to which the appellant pleaded not guilty. The case was then adjourned for another mention date and no bail was granted to the appellant.

[6] On the third mention date of the case on 8 February 2019, the charge was again read to the appellant by a Bangladeshi interpreter. The appellant changed his plea to one of guilty and admitted to understand the nature and consequences of the same.

[7] Following his guilty plea, the deputy public prosecutor proceeded to tender the facts of the case. The facts of the case were subsequently read out to the appellant. He admitted to the same. For better appreciation of the nature of the offence, the facts of the case ought to be reproduced, and thus read as follows:

FAKTA KES

1. Pada 22 November 2018 jam lebih kurang 11.30 malam, semasa Mansur Bin Jan (Pengadu) berada di rumah telah dimaklumkan oleh anak saudara Pengadu bahawa anak Pengadu bernama XXXXXXXX (mangsa) berumur 11 tahun telah diganggu oleh OKT.

2. Kejadian berlaku pada 22 November 2018 jam lebih kurang 8.30 malam semasa mangsa berada di stor Medan Selera Jaya 223, Jalan 51A/223, Seksyen 51A Petaling Jaya (tempat kejadian) untuk mengecas telefon bimbit mangsa telah datang OKT ke bilik stor tersebut.

3. OKT telah menahan mangsa keluar daripada tempat kejadian lalu telah meraba keseluruhan badan mangsa dan menyentuh kemaluan mangsa bagi tujuan seksual. Kejadian telah disaksikan oleh anak saudara Pengadu, lalu anak saudara Pengadu telah mengadu kejadian kepada Pengadu pada hari yang sama.

4. Seterusnya Pengadu telah bertanyakan sendiri berkenaan kejadian kepada mangsa dan mangsa mengesahkan bahawa OKT telah meraba seluruh badan mangsa termasuklah kemaluan mangsa.

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5. Pengadu telah hadir ke Balai Polis Sea Park untuk membuat laporan polis berkenaan kejadian pada 23 November 2018 jam lebih kurang 2.02 pagi.

6. Pada 23 November 2018 jam lebih kurang 12.21 pagi semasa Kpl Mohd Khairil Anuar Qamarullah bin Bachok (Pegawai Tangkapan) membuat rondaan cegah jenayah di kawasan Pentadbiran Balai Polis Sea Park bersama anggota Balai Polis Sea Park telah menerima satu panggilan daripada (1) perempuan Melayu memaklumkan ada berlaku kekecohan di Medan Selera 223 Petaling Jaya.

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7. Setibanya Pegawai Tangkapan bersama anggota di lokasi tempat kejadian, Pegawai Tangkapan telah berjumpa dengan (1) perempuan Melayu terbabit dan beliau telah menunjukkan lokasi berlakunya kekecohan yang dikatakan.

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8. Pegawai Tangkapan telah berjumpa dengan Pengadu yang mana Pengadu telah menyerahkan OKT kepada Pegawai Tangkapan dan memaklumkan bahawa OKT telah meraba badan dan menyentuh kemaluan anak Pengadu iaitu mangsa bagi tujuan seksual. Seterusnya, OKT ditangkap dan dibawa ke IPD Petaling Jaya untuk tindakan lanjut.

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9. Hasil siasatan oleh Insp. Satura Rumaya bt Abdul Malik (Pegawai Penyiasat) daripada keterangan-keterangan saksi terutama mangsa telah mendapati bahawa OKT telah meraba badan mangsa dan juga menyentuh kemaluan mangsa yang berumur 11 tahun bagi tujuan seksual. Oleh itu, OKT telah melakukan kesalahan di bawah Seksyen 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017.

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[8] Other exhibits were thereafter tendered to the sessions court by the deputy public prosecutor, including the complainant's police report, a copy of the victim's birth certificate, and six photos of the crime scene, which were all shown to the appellant and admitted by him.

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[9] In his mitigation, the appellant stated that he was 35 years old, married with two children and that his father had passed away. He further stated that he has an old and sick mother who was suffering from kidney stone ailment. The appellant apologised for the offence and pleaded for a light sentence to be imposed on him.

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[10] The deputy public prosecutor submitted that the offence committed by the appellant was a serious offence, which involved the dignity of a child aged 11 years old and therefore impressed the court to impose a severe sentence on the appellant.

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[11] Having heard the plea of mitigation from the appellant and the submission of the deputy public prosecutor, the sessions court convicted the appellant on the charge and sentenced him to six years imprisonment from the date of his arrest (23 November 2018) and two strokes of whipping.

[12] In imposing the sentence against the appellant, the sessions court took into consideration factors such as the public interest and thus, the need to uphold and promote the deterrence principle within the society; the seriousness of the offence; the psychological and emotional impact left on the victim following the incident; and the rampancy of sexual offences against children.

[13] On 19 February 2019, the appellant, through the prison department, filed a notice of appeal to the High Court against the conviction and sentence imposed against him by the sessions court.

[14] Hence the instant proceeding now before me.

LAW ON APPELLATE INTERVENTION

[15] In hearing this criminal appeal, I am mindful of the duty of this court as established by the governing statute and the applicable case law authorities and have therefore proceeded approaching the same accordingly.

[16] Section 316 provides for the duty of a court hearing an appeal from a subordinate court in the following terms:

> 316 Decision on appeal
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> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[17] In the often quoted authority of the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as he then was) instructively made the following observation:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.

In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefore an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):

> ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] 1 MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
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> With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:
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> (1) the views of the trial judge on the credibility of the witnesses;
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> (2) the presumption of innocence in favour of the accused;
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> (3) the right of the accused to the benefit of any doubt; and
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> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.
>
> Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt(or Thomas) v Thomas* [1947] 1 All ER 582 that:
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> > Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that *in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end*; the second is that great weight should be attached to the view taken by the sessions judge before whom

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the trial was held and who had the opportunity of seeing and hearing the witnesses.

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Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

EVALUATION AND FINDINGS OF THIS COURT

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[18] The key point I need to highlight is that this appeal, in so far as it is against the conviction of the appellant of the charge against him is plainly incompetent. This is because he had pleaded guilty to the offence as per the charge levelled against him. The law on this is settled, for s 305 of the Criminal Procedure Code states as follows:

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305 When plea of guilty limited right of appeal

When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

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[19] It is fairly well established that an accused's plea of guilty operates as a waiver of his right to appeal against conviction. He is barred from appealing against the legality of the conviction recorded against him. The High Court in *Gabriel v Public Prosecutor* [1992] 1 MLJ 593 stated thus:

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In the magistrate's court at Kuching the appellant pleaded guilty to the theft of a refrigerator, a radio cassette and an electric fan in a handicraft factory used for the custody of property, an offence punishable under s 380 of the Penal Code (FMS Cap 45). He was convicted, sentenced to one year's imprisonment and a fine of $2,000 in default six months' imprisonment.

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He appeals against the conviction and the sentence. Alternatively, he asks for a revision of his case.

Respecting the appeal against conviction, this is precluded by s 305 of the Criminal Procedure Code (FMS Cap 6) since the appellant pleaded guilty unequivocally in the court below.

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[20] It is to be observed, however, that the case mentions the appellant pleaded guilty 'unequivocally'. This means that the plea must be genuine and not made without appreciating the nature of the charge or under the misapprehension of law or fact. Thus this court, in hearing this appeal can inquire into the legality of the guilty plea of the appellant.

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[21] In this connection, the Court of Appeal in the case of *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1

MLJ 645 had in the majority judgment delivered by Gopal Sri Ram JCA (as he then was) this to say on the point:

> I begin by recognizing that under s 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the judge hearing the case to act in revision. Of course the appellant in such a case ought, wherever possible, to give the court and the Public Prosecutor adequate notice of this, setting out the grounds on which the revision will be sought. A court hearing an appeal against sentence is entitled to and will, where appropriate, act in revision and set aside a conviction. *The Malayan Law Journal* is replete with pronouncements that support this proposition and I need only mention the decisions in *Low Hiong Boon v Public Prosecutor* [1948] MLJ Supp 135 [1948–49] and *Tang Kee Chie v Public Prosecutor* [1987] 1 MLJ 430 as illustrations of the principle. Reference may also be usefully had to the remarks of Thomson CJ in *Ho Kin Luan v PP* [1959] 1 MLJ 159 at p 161.

[22] In the instant appeal before me, although the written submissions contain some references to the arguments that the appellant might not have understood the charge before pleading guilty, there is no application or submission for this court to exercise its revisionary powers.

[23] More importantly, his counsel at the appeal hearing only submitted on the appeal against the sentence. The appellant did not pursue the appeal against conviction. And in any event the written submissions on any alleged defect in the guilty plea are not sufficiently substantiated in the face of the notes of proceedings which recorded the plea of guilty and the grounds of judgment written by the learned sessions court judge.

[24] For these reasons, the decision of the sessions court on the conviction of the appellant stands.

[25] As for the appeal against conviction, I must first state what the governing principles are that an appellate judge must have regard to. I need refer only to two cases.

[26] In *Gek Sing a/l Kaliappan v Public Prosecutor* [1999] 6 MLJ 641, Vincent Ng J held, in respect of the principles governing appellate intervention against sentences, as follows:

> (13) In an appeal on sentence from the subordinate courts, the High Court will not interfere with the sentence imposed, even should it be felt that a higher or lower sentence would be more appropriate, unless it can be shown to its satisfaction that in the circumstances of the particular case, the sentence was manifestly excessive or inadequate or that in fixing the sentence, the subordinate court had failed to

adequately consider all relevant factors, either for or against the offender. See *Joginder Singh v Public Prosecutor* [1984] 2 MLJ 133; *Leong Ka Kong v Public Prosecutor* [1976] 2 MLJ 21 and *Public Prosecutor v Ng Chong Wan*.

[27] The former Federal Court in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, in the judgment of Raja Azlan Shah Ag LP provided more clarity on the considerations involved in appeals against sentence, in the following terms:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525 at p 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.
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> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren case* [1980] 3 All ER 161 at p 172).

[28] In essence is the sentence meted out against the appellant by the sessions court manifestly inadequate or grossly excessive or in any manner wrong in law?

[29] I have considered the mitigation factors highlighted by the appellant which are the repeat of what were argued before the sessions court — primarily that the guilty plea saved much judicial time, his mother's kidney problem, the wish to be back with the family, that he had cooperated with the authorities and

A that public interest would be best served with a light sentence so as to enable the appellant turn over a new leaf, become useful to society, raise and educate his two daughters and take care of his ill mother and family in Bangladesh. And I have also considered the aggravating factors — which is predominantly that this is a heinous sexual crime against a young boy.

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IMPORTANCE OF PUBLIC INTEREST CONSIDERATIONS

[30] In my view it is most useful to start any analysis of sentencing by reiterating the important point of public interest, in respect of which it was C stated by Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
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> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[31] The decision of Hilbery J for the English Court of Appeal in *R v Ball* E (1951) 35 Cr App Rep 164 is noteworthy for pronouncing two other sentencing considerations of general importance. The first, also referred to in *Public Prosecutor v Loo Choon Fatt* is the basis for appellate intervention, as follows:

> In the first place, this Court does not alter a sentence which is the subject of an F appeal merely because the members of the court might have passed a different sentence. the trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. it is only when a sentence appears to err in principle that this court will alter it. if a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure G to apply the right principles, then this court will intervene.

[32] The other, adopted by Chang Min Tat J (as he then was) in the case of *Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37, is the true meaning of the concept of public interest, which in my view is not always wholly understood, H and which in that case explained in the following terms:

> The learned president stressed the public interest in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged bya deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not I sufficiently considered the full meaning of that passage from Hilbery J in *R v Ball* (1951) 35 Cr App Rep 164 which he quoted and is now reproduced:
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> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the

> hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. *The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living*. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[33] It is useful to take cognisant of what the Court of Appeal had said in *Ho Kin Luan & Anor v Public Prosecutor* [1959] 1 MLJ 159:

> Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

[34] This is a truism in crime and punishment. For it has also been said that a particular offender may be so induced only by a deterrent sentence of a long term of imprisonment. But another may well only benefit by being given a second chance.

[35] Public interest therefore not only should reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of the accused himself.

THE RELEVANCE OF A GUILTY PLEA

[36] A guilty plea is a factor that should always be taken into account in assessing the appropriate sentence. This is well-settled. In the majority decision of the Federal Court in *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 Lee Hun Hoe CJ (Borneo) held as follows:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only serves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses ...

[37] A similar sentiment was expressed by Wee Chong Jin CJ in the Singapore case of *Melvani v Public Prosecutor* [1971] 1 MLJ 137 who had earlier stated thus:

> In principle I consider it proper that where an accused person pleads guilty the court in assessing sentence ought to consider such plea as a mitigating factor. What weight ought to be given by the court depends on the other facts made known to the court at the time the sentence is considered ...

[38] What the guilty plea means in practical terms vis a vis the reduction or discount normally granted to the jail sentence was explained in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, where it was held by the Supreme Court as follows:

> in this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to theamount of money defalcated and the other circumstances of the case. *It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.*In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment. (Emphasis added.)

[39] The fact that a guilty plea is a mitigating factor which saves much judicial time as expressed in *Sau Soo Kim v Public Prosecutor* and that credit ought to be given to those who choose to plead guilty is thus well-settled. A plea of guilty is invariably always to be taken into account in the sentencing process. And in the instant case the maximum punishment is 20 years' imprisonment.

THE SENTENCE MUST ALSO BE PROPORTIONATE

[40] This is not to say that the elements of retributive justice is given less consideration. The decision of the Court of Appeal in *Pendakwa Raya v Abdul Halim bin Ishak & Anor* [2013] MLJU 821; [2013] 9 CLJ 559 made it clear in the following terms:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part, its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

[41] And it certainly cannot be denied that as suggested earlier, the sentence to be meted must be proportionate to both the gravity of the offence and the degree of responsibility of the accused. In the often quoted decision of the Canadian Supreme Court in *R v Ipeelee* [2012] SCJ No 13 it was held by Le Bel J instructively as follows:

> Proportionality is the sine quo non of a just sentence. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

THE FACTS AND CIRCUMSTANCES OF EACH CASE MUST BE APPRECIATED

[42] Thus, when examining the length of custodial sentence the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence as admitted by the accused, any mitigating factors, and sentences that have been imposed in the past for similar offences.

[43] Another case of importance in this context is the Supreme Court decision in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 which ruled in the following clear terms:

> In assessing the length of custodial sentence the court must look at the overall picture in perspective by considering firstly the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[44] The facts of the case as admitted by the appellant and as stated above are plain and straightforward. Sexual crimes against the young cannot be tolerated under any circumstances. It is a scourge in our society that is abhorred and unacceptable. Yet the background of the accused too cannot not be taken into account. Although it can be said to be a natural consequence of those matured adults like the accused herein who was found guilty of transgressions of the law of the land, the incarceration of the accused whilst in remand must have affected the well-being and to a certain extent the livelihood of his family back in Bangladesh.

[45] Thus in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, Abdul Rahman Sebli J (as he then was) said:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters

A that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. *But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.* (Emphasis added.)

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[46] In the final analysis a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval vis a vis the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective.

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[47] Mitigating factors in favour of an accused person, particularly the fact that he has pleaded guilty and that he is a first time offender with no previous criminal record and claimed to be remorseful are especially pertinent too, if not strong considerations.

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[48] On the other hand, the gravity of the offence under s 14(a) of the Sexual Offences Against Children Act 2017 is reflected in the punishment specified in the provision which is a jail term which may extend up to 20 years and may include whipping. Here the appellant was sentenced to six years' imprisonment and two whips of the rattan.

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[49] Also, the enactment of the Sexual Offences Against Children Act 2017 itself reflects firstly a clear concern on the part of the government on the increase and rampancy of the offences of such nature and secondly, its commitment to specifically penalise the offender of the offence and provides for heavier sentences.

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[50] Thus, the Act provides for heavier range of sentences in respect of sexual offences against children as compared to other sexual offences of similar nature under other laws. These include outraging modesty under s 354 of the Penal Code which carries a sentence of imprisonment which may extend to ten years or with fine or with whipping or with any two of such punishments; outraging decency under s 377D of the Penal Code which carries a sentence of imprisonment for a term which may extend to two years; and inciting a child to an act of gross indecency under s 377E of the Penal Code which carries a sentence of imprisonment which may extend to five years and with whipping.

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SENTENCING TREND

[51] It cannot be emphasised enough that although it has been said that judicial precedent plays little role in sentencing in the absence of the background and antecedents of the accused as well as the facts of the case, the recent and present trend of sentencing of the offence in question is invariably always pertinent.

[52] When I suggested at the hearing that a jail term of six years was probably lighter than many in cases under the range of sentences meted out as punishment for convictions under this s 14(a) of the Sexual Offences Against Children Act 2017, counsel for the appellant seemed to agree that the sentence was within the range and even asked that the status quo be maintained.

[53] The prosecution, I should add, did not file a cross appeal against the sentence. However neither the appellant nor the respondent offered any information vis a vis any reported cases to this court on the sentencing trend.

[54] My own research shows that the punishment recorded in recent cases for s 14 offences include *Mohamad Izzaini bin Zainudin v Public Prosecutor* [2019] 7 MLJ 366 where the sentence was a jail term of seven years and one stroke of whipping for each of the three charges, *Helerry ak Bungkok v Public Prosecutor* [2019] 10 MLJ 308 where the imprisonment was for ten years, accompanied with two strokes of whipping for each of the two charges under s 14(d); and *Razali bin Silah v Public Prosecutor* [2019] 12 MLJ 205, where a jail term of four years and one stroke of whipping was ordered by the court.

[55] I must make it clear however that of the three cases, only in *Helerry ak Bungkok* did the accused plead guilty. In that case the jail term was for ten years.

[56] Whilst recognising that no two cases present the same facts, it appears from the abovementioned recently reported decisions (and other newspaper reports) that the sentence of six years' imprisonment and two strokes of whipping in the case before me is within the range of punishment for cases under s 14 of the Sexual Offences Against Children Act 2017.

[57] In my view the learned sessions court judge had taken into consideration all relevant factors when meting out the sentence. From the grounds of judgment it is clear that the seriousness of the crime committed by the appellant was taken into account, including the rampancy of such offences. And these have been weighed against mitigating factors raised by the appellant as mentioned earlier. It is also plain that the learned sessions court judge was especially mindful of considerations of public interest — particularly on the

need to send a signal that this sexual crime against children, in this case involving a young boy — is downright abhorrent, with emphasis on the sentencing principle of deterrence.

[58] I am satisfied that the learned sessions court judge had evaluated all relevant considerations in seeking to achieve a sentence that as closely as possible reflect the key sentencing objectives of retribution and reformation but also especially prevention and deterrence (see *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186).

[59] In my judgment, the sentence meted out against the appellant — of six years' imprisonment from the date of arrest and two strokes of whipping is in consonance with a careful attempt to strike a balanced determination of the most proportionate, fair and appropriate punishment for the appellant for having pleaded guilty to the commission of the offence under s 14(a) of the Sexual Offences Against Children Act 2017.

CONCLUSION

[60] In view of the foregoing, in particular having regard to the facts of the case, the mitigating and aggravating factors and the principles of sentencing and its prevailing trend, I find that the sentence imposed by the sessions court against the appellant is not grossly inadequate or manifestly excessive nor in any manner inflicted by any erroneous application of any legal principles. The appeal against the sentence is therefore dismissed.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh